Supreme Court, U. S.
FILED
MAR 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1234

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,

Petitioners,

—against—

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, AFL-CIO,

Petitioners,

- against -

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW.

The opinion of the court of appeals (App.1a-4a) is not officially reported. The decision and order of the District Court for the Southern District (Tenney,J) is reported at 433 F.Supp. 1087 (App. 7a-29a)

JURISDICTION

The judgment of the court of appeals (App. 5a, 6a) was entered on December 6, 1977. The jurisdiction of this Court is invoked under 28 USC&1254(1) and in accordance with Supreme Court Rule 19.

QUESTIONS PRESENTED

1. Whether a complaint in the United States District Court specifically alleging Railway Labor Act (RLA) &45 U.S.C. &151et. seq., violations by an air carrier should be dismissed as a representational dispute within the jurisdiction of the National Mediation Board (NMB) when there is no petition pending at the NMB nor any one else claiming to be the representative and there is a contract between the carrier and a union which recognizes the union as the collective bargaining representative?

2. Whether a voluntary agreement covering less than a class or craft which recognizes a collective bargaining representative is subject to the provisions of the RLA.

3. Can a carrier exclude itself from coverage of the RLA by private agreement?

STATUTES INVOLVED

The Railway Labor Act 45 U.S.C. &151 et. seq., specifically Section 2, Fourth provides:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No

carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2, Ninth provides:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees in-

volved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF CASE

The issue on this appeal is the dismissal of the complaint in which the International Association of Machinists and Aerospace Workers, Afl-Cio. (hereinafter the IAM & AW) sought a preliminary injunction against Compagnie Nationale Air France (Air France) for violations of the Railway Labor Act (RAL) && 2,6.

The IAM & AW is seeking to enjoin Air France from unilaterally terminating a labor contract between the IAM & AW and Air France, from dealing with anyone other than IAM & AW as the exclusive

representative of the cargo agents employed at Air France, and from violating the terms and obligations of the contract in effect between the IAM & AW and Air France covering the cargo agents.

The IAM & AW brought the action by way of an Order to Show Cause with a Temporary Restraining Order, Summons and Complaint. After a preliminary hearing before the Honorable Charles L. Brieant, U.S. District Court Judge for the Southern District of New York, in which Judge Brieant found that the equities were decidedly in favor of the IAM & AW, Judge Brieant signed the Order to Show Cause with the Temporary Restraining Order requiring Air France to recognize and treat with IAM & AW as the representative of the cargo agents, to deduct union dues and to honor the terms and conditions of the contract which had been in effect.

On the return day, June 24, 1977, Honorable Charles H. Tenney, U.S. District Court Judge for the Southern District of New York, had a limited hearing which he adjourned until the following week. No further hearing was ever held and Judge Tenney issued his decision dismissing the case for lack of jurisdiction on the ground the issue was a representational question and thus a major dispute within the exclusive jurisdiction of the National Mediation Board (NMB)(App. 7a-28a) A Motion by IAM & AW to reargue the decision was denied by the Court in an endorsed order.

The Court of Appeals for the Second Circuit heard the appeal on December 6, 1977 and rendered an oral disposition in which it affirmed the District Court with two corrections. (App.1a-4a)

FACTUAL BACKGROUND

The IAM & AW has been the exclusive representative of the cargo agents at Air France for 25 years. During this time the parties have entered into many successive contracts covering the cargo agents. During this time the NMB has assisted in settling labor contracts, the most recent being the 1974 settlement of a four months strike.

On January 3, 1977, a three year contract was signed between the parties covering the period until September 30, 1979. The terms of the contract were in force until May 4, 1977, a period of five months, when Air France sent a telegram to Wally Haber, General Chairman IAM & AW which stated that as of May 4, 1977, the contract had been terminated under Article XVII(q), Air France would no longer recognize the IAM & AW as the bargaining agent and would no longer deduct union dues.

Article XVII (q) of the contract states:

"Notwithstanding the "Effective Date and Duration" provisions of this Agreement and any references to the Railway Labor Act in this Agreement, if a decision of the National Mediation Board permits the certification of a representative of employees of any airline who perform functions analogous to those being performed by the employees covered by this Agreement in a group other than the class or craft of which the NMB has historically determined such employees to be a part, then this Agreement will terminate."

Air France posted a notice at the cargo facilities on the same day ordering the cargo agents to attend a meeting. At the meeting Air France officials, Roland J. Hawkins, Vice-President and General Manager, Eugene Carrara, Personnel Services Manager and John Devlin, Airport Cargo Manager, informed the cargo agents that the contract was cancelled,

the IAM & AW no longer represented them and Air France would not check off the IAM & AW dues. The cargo agents were ordered to select three representatives from amongst the cargo agents to meet with Air France to negotiate over terms and working conditions. Similiar meetings took place at Air France's other stations in the United States. Since May 4, 1977, Air France has met with certain employees and has changed the terms and working conditions. Since May 4, 1977, Air France refuses to treat with the IAM & AW as the representative of the cargo agents and has refused to check off dues.

Air France stated in the telegram of May 4, that it was basing its actions on a decision by the NMB in United Airlines, Inc., R-4550 which involved employees who do different work than the cargo agents at Air France. At no time during this series of events has Air France filed a Section 6 notice as required by the RLA.

When Wally Haber, General Chairman, IAM & AW, tried to have the issue submitted to arbitration and the system board of adjustment, Eugene Carrarra, Personnel Manager and Officer in charge of labor contracts at Air France, refused to do so. As Air France would not meet to discuss the resulution of the issues as required by RLA &2, Second the IAM & AW commenced this action to enjoin Air France violating the RLA.

The complaint specifically pleaded the violations of the RLA inclusive of all the actions taken by Air France from the telegram of May 4, to the changing of the terms of employment.

REASONS THE WRIT SHOULD BE GRANTED

1. THE JURISDICTION OF THE FEDERAL COURTS AND THE NMB SHOULD BE DEFINED AS THERE APPEARS TO BE A CONFLICT BETWEEN THE DECISIONS OF DIFFERENT COURTS OF APPEAL.

The crux of the decision of the District Court, which was affirmed by the Court of Appeals, Second Circuit, was stated (App. 27a): "This Court concludes that the issue here is really one or representation, a subject which Congress has given the Mediation Board the duty to determine."

The complaint specifically alleged that the carrier had violated the RLA by its actions and sought injunctive relief restoring the parties to the same status and conditions as had been in effect prior to the decision of Air France to terminate the contract. The complaint sought to continue the contract which had been signed on January 3, 1977 and was by its terms to run until September 30, 1979. Air France had voluntarily recognized the IAM & AW as the collective bargaining representative for the cargo agents as it had done for 25 years. During the period from the signing of the contract on January 3, 1977 until May 4, 1977, when Air France sent the telegram (App. 29a) that the contract was cancelled, no one else claimed to be the collective bargaining representative nor did anyone file a petition with the NMB asking for an election to determine the representative. Under virtually similiar circumstances in Burlington Northern Inc. v. American Railway Supervisors Association, 503 F. 2d 58 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975) the Court addressed the same issue of jurisdiction as follows:

"Before reaching the merits we must consider the threshold issue of whether this Court has jurisdiction to decide the questions presented in

the cross-appeals. The District Court held that the controversy between plaintiff and ARSA was in essence a Railway Labor Act representation dispute, the resolution of which must be left to the NMB, and on this ground, dismissed both the complaint and the counterclaim. We disagree with the District Court on this point. In our view, the dispute before us is not one under 45 U.S.C. &152 Ninth, because no employee or other union has challenged ARSA's certification."

It is section 2, Ninth RLA on which the District Court based its decision of giving the NMB jurisdiction in the instant case. As in the Burlington Northern case, there was no challenge to the IAM & AW representation status. The holding in the Burlington Northern case should apply to the facts of this case, thus jurisdiction should not be with the NMB but rather in the Federal Courts. In the oral disposition of this matter, the Court of Appeals distinguished this case from the Burlington Northern case on the grounds that the Burlington Northern case was based on a Merger Agreement and the Interstate Commerce Commission actions. (App. 2a, 3a). In the Burlington Northern case the Court took into consideration both of these grounds but proceeded to further hold that these two factors were not contrary to the RLA. The Court stated:

"The Employees Merger Protection Agreement was a condition of the ICC approval of the merger, authorized by Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. &5(2)(f). The agreement is not inconsistent with any provision of the RAilway Labor Act., ..."

The Court's holding in the Burlington Northern case, although involving other considerations, is re-

levant to the facts in this case as to the Seventh Circuit's interpretation of Section 2, Ninth of the RLA. Under the Burlington Northern decision the NMB would not have jurisdiction and the relief sought for violations of the RLA would properly be before the Federal Courts as established in Texas & NORR Co. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548 (1930), Brotherhood of RR Trainmen v. Central of Ga. Ry Co., 305 F. 2d 605 (5th Cir. 1962), Westchester Lodge 2186, Brotherhood of Railway and Steamship Clerks v. Railway Express Agency, Inc., 329 F 2d 748 (2nd Cir. 1964). The holding of the Second Circuit is contrary and would give jurisdiction to the NMB and exclude the Federal Courts. The issue should be resolved so that uniformity will prevail regardless of the Court of Appeals in which this issue would arise.

2. THE CASE RAISES AN IMPORTANT QUESTION UNDER THE RAILWAY LABOR ACT WHICH SHOULD BE SETTLED BY THIS COURT.

The issue of whether a voluntary agreement which recognizes collective bargaining representative of less than a class or craft unit is within the coverage of the RLA is of substantial consequence. There are great numbers of contracts entered into by voluntary recognition agreements of representatives of less than class or craft units covering thousands of employees in all parts of the United States. The NMB has proffered its services and been party to the settlement of labor disputes in these situations pursuant to the RLA.

Air France first raised the issue in the Court of Appeals. It is Air France's position that because

the language in the RLA &2 - Fourth refers to representatives of the "class or craft" that any unit less than a craft or class, regardless of whether there is a voluntary recognition agreement, is not covered by the RLA. Air France cites as authority for its position the decision of the District of Columbia Court of Appeals in International Brotherhood of Railway, Airline and Steamship Clerks, 402 F. 2d 196 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968). that certification by the NMB that employees had no representative as the result of an election to carry out negotiations contemplated by the RLA and that the employment relationship of the parties was not governed by the RLA.

The issue is critical because in situations where there are such circumstances then neither the carrier nor the employee representative would have a right to invoke the jurisdiction of the Federal Courts or the NMB when labor disputes arose and would be left to their respective self help resources. The unions would have to decide at the end of each contract to file a petition for an entire craft or class in order to safeguard their status or take the chance that the carrier would continue to negotiate with them although without recourse to the RLA. If Air France is correct entirely different employment relationship then presently exist will come into existence as the issue of representational status will be constantly hanging over negotiations between the parties. This situation would create turmoil at both the NMB and the bargaining table.

CONCLUSION

For the foregoing reasons,this petition should be granted and a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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February 24,1978

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - -X

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,

Appellants,

-against- Dkt. No.
77-7430

COMPAGNIE NATIONALE AIR
FRANCE,

Appellee.

- - - - - - - - - - - - - - - - - -X

Before:

HON. WALTER R. MANSFIELD,
J. EDWARD LUMBARD and
J. JOSEPH SMITH, Circuit Judges.

New York, N.Y., December 6, 1977

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Statement made by the court at disposition of appeal in open court.

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JUDGE MANSFIELD:

Gentlemen, we have read the record and reviewed it. We do not believe that anything need be added to what Judge Tenney has written. You've presented your case very well, Mr. Quill, but after reading and reviewing the briefs, we are satisfied that the judgment of the district court should be affirmed, essentially for the reasons stated by Judge Tenney, with one or two exceptions. We view this as basically a representation dispute which should be within the primary jurisdiction of the National Mediation Board. We view the Burlington Northern case as clearly distinguishable for the reason that the labor contract enforced by the court, including recognition of the certified union, had been imposed upon the carrier by the ICC as a precondition to the Merger Agreement.

Thus jurisdiction was based on both the Merger Agreement and the ICC's action. No such agency action is found here.

Now there are one or two things in Judge Tenney's opinion that we do not necessarily accept. One of those is the statement that Article XVII(q) was inserted in the contract in order to get around some prior rulings of the National Mediation Board, which denied certification of cargo agents as a class or craft of employees. That we do not accept as the reason for the clause. Secondly, I think he inadvertently referred to the representational question as a "major," as distinguished from a "minor," dispute within the jurisdiction of the National Mediation Board. We would classify it as a representational dispute.

With those qualifications, we affirm, essentially for the reasons stated by Judge Tenney. Thank you.

APPENDIX B

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of December, one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD

Circuit Judges

- - - - - - - - - - - - - - - - -X

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,

Plaintiffs-Appellants,

v. 77-7430

COMPAGNIE NATIONALE AIR FRANCE,

Defendant-Appellee.

- - - - - - - - - - - - - - - - -X

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by
ARTHUR HELLER,
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -X

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO (IAM), et al,

Plaintiff,

-against-

77 Civ. 2913 (CHT)

COMPAGNIE NATIONALE AIR FRANCE,

MEMORANDUM

Defendant.

#46115

- - - - - - - - - - - - - - - - - -X

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TENNEY, J.

Plaintiff International Association of Machinists and Aerospace Workers ("IAM") has applied for a preliminary injunction enjoining defendant Compagnie Nationale Air France ("Air France") from unilaterally cancelling the previously effective collective bargaining agreement of January 3, 1977 and from ceasing to recognize plaintiff as the legal representative of the cargo agents at Air France. After a brief hearing before Judge Brieant of this court on June 15, 1977, a temporary restraining order was signed requiring the parties to operate under the January 3 agreement. On June 24, 1977, the parties appeared in court to argue the plaintiff's motion for a preliminary injunction and the Court continued the temporary restraining order until it could determine if jurisdiction was

proper to entertain the action for injunctive relief. For the reasons stated below, plaintiff's motion is denied and the case is dismissed.

The relevant details are as follows. Plaintiff is a labor union which has been "the exclusive bargaining representative for the cargo agents and lead cargo agents employed by Air France since 1950." Complaint ¶ 5. Airline employees performing cargo agent duties have "since 1947, historically been included in an overall 'craft or class' of Clerical, Office, Fleet an Passenger Service employees." Carrara Affidavit, sworn to June 23, 1977 at 3. Defendant Air France contends that the cargo agents wish to separate from the IAM and seek to be represented as a separate group by the International Brotherhoods of Teamsters ("IBT"). The Railway Labor Act

("RLA"), 45 U.S.C. §§ 151-88, provides a procedure by which airline employees select a labor organization as their collective bargaining representative, provided that such representative has been so designated by a majority of the employees in a "craft or class" of airline employees and recognized by the National Mediation Board ("NMB"). RLA § 2, Fourth and Ninth, 45 U.S.C. § 152, Fourth and Ninth.

On January 3, 1977, Air France and IAM agreed to a new collective bargaining contract, which included, inter alia, the following unique provision in Article XVII (q):

> "Notwithstanding the 'Effective Date and Duration' provisions of this Agreement, and any reference to the Railway Labor Act in the Agreement, if a

decision of the National Mediation Board permits the certification of a representative of employees of any airline who performs functions analogous to those being performed by the employees covered by this Agreement in a group other than the class or craft of which the National Mediation Board has historically determined such employees to be a part, then this agreement will terminate."

On May 4, 1977, Air France notified IAM of an NMB decision of March 23, 1977 which recognized as a separate bargaining unit United Air Lines freight agents. See NMB Case No. R-4550, annexed as Exhibit A to Affidavit of Eugene Carrara, sworn to June 20, 1977. Air France construed this decision as permitting certification of a

collective bargaining representative for United Air Lines employees who perform functions analogous to those performed by Air France's cargo agents. Air France therefore informed IAM that the January 3 agreement was terminated in accordance with the provisions of Article XVII (q).

Five weeks later IAM institited this action. It contends that Air France's action in unilaterally ceasing performance under the agreement was unlawful and in violation of that agreement and sections 2 and 6 of the RLA. Complaint ¶¶ 8-12. It is undisputed that neither Article XVII (q) nor any other term of the contract prescribes a method or procedure for determining whether an NMB decision triggers Article XVII (q). IAM further contends that even if Air France's action is deemed consistent with

Article XVII (q), that article itself must be declared illegal and in violation of the RLA since it "was forced into the contract by Air France, [and] it is clearly an attempt to by-pass legislation passed by Congress and is in violation of public policy and thus is null and void." Id. ¶ 12. IAM argues that Air France's decision to no longer recognize IAM as the representative of the cargo agents "unilaterally changed the terms and working conditions of the cargo employees in violation of Section 6 of the Railway Labor Act," id. ¶ 10, and that "Air France is attempting to use the United Airlines determination as a subterfuge to eliminate the [IAM] as the representative of the cargo agents in violation of Section 2 of the Railway Labor Act." Id. ¶ 11. Air France argues in opposition that it did not act

unilaterally to change the contract but that its termination of the contract was itself an act authorized by Article XVII (q) of the contract. Air France also asserts that the article was legitimately bargained for and is proper and lawful. IAM requests the Court to issue an order enjoining Air France from interfering with the representation of its employees by the IAM and declaring the January 3 contract in full force. Id. ¶¶ 15-16.

In essence, the plaintiff is asking the Court to construe Article XVII (q) to determine whether Air France's actions complied with the contract and with the Railway Labor Act. It is well-settled that Congress established the act to provide explicit procedures for the settlement of labor disputes. The specific procedure to

be used in any given dispute depends on whether that dispute is considered "major" or "minor". 45 U.S.C. §§ 151 et seq. The Supreme Court has defined these terms as follows:

> "[Major disputes relate] to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> "[Minor disputes contemplate] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or

to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723 (1945).

The United States Court of Appeals for the Second Circuit has further explicated the distinction between major and minor disputes.

"Distinguishing between a minor dispute (interpretation and application of an existing agreement) and a major dispute (formation or alteration of an agreement) can sometimes be quite difficult, for there are areas in which the line seems rather indistinct. Agreements are ofttimes changed as much by

interpretation as by the substitution of new agreements. As Judge Waterman observed for this court in Rutland Railway Corp. v. Brotherhood of Locomotive Engineers . . . 'the difference, on the one hand, between the interpretation and the application of an existing agreement, and, on the other hand, a change in an original intended basis of agreement is often a question of degree.' 307 F.2d at 33." Westchester Lodge 2186, Brotherhood of Railroad Clerks v. Railway Express Agency, Inc., 329 F.2d 748, 752 (2d Cir. 1964).

If the quarrel between the parties is whether the terms of the collective bargaining agreement of January 3 has been complied with, then it would be characterized as a minor dispute. Such disputes fall within

the exclusive jurisdiction of the National Railroad Adjustment Board, which has authorized local System Boards of Adjustment to consider these disputes under section 204 of the RLA, 45 U.S.C. § 184. Elgin, Joliet & Eastern Railway Co. v. Burley, supra; United Transportation Union v. Penn Central Transportation Co., 505 F.2d 542, 543-44 (3d Cir. 1974); Local 1477, United Transportation Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973); International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549, 554 (1st Cir.), cert. denied, 409 U.S. 845 (1972); Airlines Stewards & Stewardesses Association, Local 550 v. Caribbean Atlantic Airlines, 412 F.2d 289, 291 (1st Cir. 1969); Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964); District 100,

International Association of Machinists and Aerospace Workers v. Compagnie Nationale Air France, 414 F.Supp. 538, 542 (E.D.N.Y. 1976); Deboles v. Trans World Airlines, 350 F.Supp. 1274, 1283-84 (E.D. Pa. 1972). Therefore, this Court is without authority to interpret the terms of the collective bargaining agreement and determine whether Air France's actions are in lawful compliance with the agreement. Although the section primarily contemplates resolution of employee grievances, its literal mandate must be adhered to, and it is irrelevant that the dispute in this case is between a union and an employer rather than an employer and an employee. International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc., supra, 473 F.2d at 555; Deboles v. Trans World Airlines, supra, 350 F.Supp. at 1284.

A federal court may, however, issue an injunction to preserve the status quo in order to protect the jurisdiction of the Adjustment Board when a dispute has been submitted for consideration pursuant to the procedures outlined in 45 U.S.C. § 184. See Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co., 373 U.S. 33 (1963); United Transportation Union v. Penn Central Transportation Co., supra, 505 F.2d at 545; Westchester Lodge 2186, Brotherhood of Railroad Clerks v. Railway Express Agency, Inc., supra, 329 F.Supp. at 753.

Because neither party has exhausted appropriate remedies by following the grievance procedure outlined in Article XIV of the collective bargaining agreement and submitting the dispute to the System Board of Adjustment, this Court cannot issue an

injunction to protect the exclusive jurisdiction of a forum whose authority has not been invoked. United Transportation Union v. Penn Central Transportation Co., supra, 505 F.2d at 545; Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union, 413 F.Supp. 681, 685 (E.D. Mich. 1976).

Plaintiff also challenges the legality of Article XVII (q) of the contract in light of the RLA. This claim, however, does not depend upon an interpretation of the terms of the contract and is therefore not a minor dispute within the jurisdiction of the System Board of Adjustment. IAM claims that the article is a subterfuge intended to permit Air France to change the terms of the January 3 contract. Characterized thus, the dispute would fall within the category

of major dispute. Plaintiff claims that Article XVII (q)

> "is illegal and in violation of the Railway Labor Act. The procedure for determining who is the representative of employees under the Railway Labor Act are [sic] specified in the Act. The clause, which was forced into the contract by Air France, is clearly an attempt to by-pass [this procedure]." Complaint ¶ 12.

Jurisdiction to consider major disputes lies with the National Mediation Board under section 2 of the RLA, 45 U.S.C. § 152. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969); Westchester Lodge 2186 v. Railway Express Agency, Inc., supra; Brotherhood of Railway & S.S. Clerks v. United Air

Lines, Inc., 325 F.2d 576 (6th Cir. 1963), cert. dismissed, 379 U.S. 26 (1964). Plaintiff claims that Article XVII (q) is illegal and therefore that Air France's actions constitute an alteration of the existing contract. As well as considering issues relating to changes in existing contracts or formation of new ones, the NMB has been granted primary authority over issues of representation of employees in the bargaining process. 45 U.S.C. § 152, Ninth. Brotherhood of Local Fireman & Enginemen v. Seaboard Coast Line Railroad Co., 413 F.2d 19 (5th Cir.), cert. denied, 396 U.S. 963 (1969); Howard v. St. Louis-San Francisco Railway Co., 244 F.Supp. 1008 (D.C. Mo. (1965), aff'd. 361 F.2d 905 (8th Cir.), cert. denied, 385 U.S. 986 (1966); Ruby v. American Airlines, Inc., supra; Dones v. Eastern Air Lines, Inc., 408 F.Supp. 1044, 1048 (D.P.R. 1975).

The United States Court of Appeals for the First Circuit has expounded upon this principle in a case calling for a determination of the representative of airline employees. The plaintiff union was the bargaining representative of certain Northeast Airline employees prior to the merger of Northeast and Delta Air Lines. The merger was accomplished under a Civil Aeronautics Board order which specifically affected certain working conditions. Plaintiff claimed that Northeast should have negotiated with it regarding the effects of such merger terms. The court explained:

> "Where there is no real question about whether a union is the legitimate representative of an airline's employees, the . . . function of deciding the

> extent of the duty to bargain rests properly with the federal court . . . .
>
> "However, the duty to bargain imposed by the Railway Labor Act is a duty to bargain with a chosen representative of the majority of the craft or class of employees. At the very least, the merger created real doubts about whether the plaintiffs represent the majority of any Delta [Airlines] craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the NMB."

International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc., 536 F.2d 975, 977 (1st Cir.), cert. denied, 45 U.S.L.W. 3364 (U.S. Nov. 15, 1976) (citations omitted).

See also Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union, supra, 413 F.Supp. at 685.

The complaint in this case charges that defendant acted in violation of the contract and seeks a declaration of the contract's vitality. The defendant's justification of its actions as proper under the contract would seem to categorize the dispute as minor. Local 1477, United Transportation Union v. Baker, supra, 482 F.2d at 230; Rutland Railway v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d. Cir. 1962), cert. denied, 372 U.S. 954 (1963). It is obvious, however, that the gravamen of the complaint concerns IAM's continued representation of Air France's cargo agents--a major dispute within the primary jurisdiction of the NMB. In fact. Air

France admitted in court that Article XVII (q) was inserted in the January 3 contract in order to circumvent prior rulings of the NMB which denied certification of cargo agents as a class of employees to be represented by the IBT. Transcript of June 24, 1977, at 14-15.

This Court concludes that the issue here is really one of representation, "a subject which Congress has given the Mediation Board the duty to determine." Ruby v. American Airlines, Inc., supra, 323 F.2d at 254. Therefore it will not exercise jurisdiction over the matter. Burlington Northern Inc. v. American Railway Supervisors Association, 503 F.2d 58 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); Brotherhood of Railway, Airline & Steamship Clerks v. Pan American World Airways,

Inc., 404 F.2d 938 (2d Cir. 1969); Aircraft Mechanics Fraternal Association v. United Airlines, Inc., 406 F.Supp. 492 (N.D. Cal. 1976). Nor will the Court exercise its discretion to issue an injunction to preserve the status quo while the procedures for settling the dispute are exhausted. This refusal to grant the equitable relief requested by the plaintiff is justified where it does not appear that the party has pursued those administrative remedies which the injunction is intended to protect.

Accordingly, the plaintiff's motion is denied and the action is dismissed.

So ordered.

Dated: New York, New York
July 1, 1977

/s/ Charles H. Tenney
U.S.D.J.

Appendix D

Telegram of May 4, 1977

International Association of
Machinists and Aerospace Workers
8 Freer Street
Lynbrook, New York 11563

Attn: Mr. Wally Haber

By virtue of the decision of the National Mediation Board Dated March 23, 1977 in United Airlines, Inc., R-4550, and Article XVII(q) of the agreement , effective October 1, 1976 between Compagnie Nationale Air France and the International Association of Machinists and Aerospace Workers (I.A.M. & A.W.) representing cargo agents in the employ of Air France. That agreement has been terminated. Such termination applies to Article II(a) under which Air France recognized the I.A.M. & A.W. as bargaining agent for employees covered by the agreement and article XIX (h) under which Air France agreed to deduct union dues from the pay of employees during the life of the agreement. Since the I.A.M. & A.W. has not been certified as the representative of these employees under the provisions of the Railway Labor Act and its treatment as bargaining agent for those employees has depended exclusively on the voluntary recognition agreement embodied in Article II(a), Air France now has no further obligation to recognize the I.A.M. & A.W. as the bargaining agent for the employees formerly covered by the agreement. There since the agreement has been terminated as described above, effective this date the company will not voluntarily continue to recognize the I.A.M. & A.W. as bargaining agent for the cargo employees formerly covered by the agreement.

Signed Roland J. Hawkins
Vice President and General Manager North and Central
American Division Compagnie Nationale Air France

Supreme Court, U. S.
FILED
APR 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1234

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, AFL-CIO,

Petitioner,

—against—

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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No. 77-1234

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-against-

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Questions Presented

1. Is there a conflict in other Courts of Appeals with the decision below that there was no jurisdiction over plaintiff's complaint because "the gravamen of the complaint concerns IAM's continued *representation* of Air France's cargo agents", a

question within the exclusive jurisdiction of the National Mediation Board?[1]

2. Does the contention that Section 2 or Section 6 of the Railway Labor Act prevents the application of an agreement for limited voluntary recognition of an employee representative, in accordance with its terms, to terminate that recognition present an important question for decision under that Act?

3. Does petitioner, which is neither certified nor recognized as the representative of Air France cargo agents, have standing to assert claims that Air France interfered with the rights of its cargo agent employees?

Statement Of The Case

Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") brought this action on June 15, 1977 against Compagnie Nationale Air France ("Air France") seeking, among other things, to enjoin Air France from negotiating for its cargo agents with anyone other than IAM on the premise that a labor agreement which had terminated in accordance with its terms was still effective. It now seeks review of the judgment of the United States Court of Appeals for the Second Circuit which affirmed from the bench the dismissal of the IAM's complaint, and denial of its motion for a preliminary injunction, by the United States District Court for the Southern District of New York. 433 F.Supp 1087.

The following undisputed facts were established by affidavits filed in the district court:

The IAM has never been certified by the National Mediation Board ("NMB") as the representative of the cargo agents employed by Air France, and could not be so certified since the cargo agents do not constitute a "craft or class" of employees entitled to choose a representative under the Railway Labor

[1] District Court opinion, App. C., p. 26a; emphasis in original. References to App. A-D are to the appendices to the petition herein.

Act ("RLA"), 45 U.S.C. §§151-188.[2] On January 3, 1977, the IAM and Air France entered into an agreement ("the Agreement") which again extended recognition to the IAM as the representative of the cargo agents. The Agreement, however, limited that recognition by Article XVII(q), which provided for termination of the Agreement and of recognition in the event of a decision of the NMB on any airline which affected the craft or class in which the cargo agents had historically been included for representation purposes. Article XVII(q) provided:

> "Notwithstanding the 'Effective Date and Duration' provisions of this Agreement, and any reference to the Railway Labor Act in the Agreement, if a decision of the National Mediation Board permits the certification of a representative of employees of any airline who performs [sic] functions analogous to those being performed by the employees covered by this Agreement in a group other than the class or craft of which the National Mediation Board has historically determined such employees to be a part, then this Agreement will terminate." (App. C, pp. 10a-11a).

On May 4, 1977, Air France notified the IAM that because of a decision on March 23, 1977 by the NMB, the Agreement, pursuant to Article XVII(q), had been terminated and that Air France therefore would no longer recognize the IAM as the representative of the cargo agents. Following termination of the Agreement and of recognition, the IAM did not pursue any of the administrative remedies available to it under the provi-

[2] In its Case No. R-4492 (March 3, 1976), *In the Matter of Representation of Employees of Air France (Cargo Agents)*, the NMB dismissed the application of an organization to represent the cargo agents on the ground that they did not constitute a craft or class. Under the RLA, a union can obtain certification as the representative of employees of an air carrier only if the NMB determines that those employees constitute a craft or class. RLA Sections 2 Fourth and 2, Ninth; 45 U.S.C. §§152, Fourth, 152, Ninth. The statute, however, does not prohibit a carrier from entering into labor agreements covering employees who, as a group, do not constitute a craft or class; carriers, including Air France, have on occasion recognized representatives of such employee groups.

sions of the RLA incorporated in the contract. Since the IAM never submitted any question of the interpretation or application of Article XVII(q) to the System Board of Adjustment, it must be accepted for purposes of this case—as the courts below did—that Air France correctly applied the clause in accordance with its telegram of May 4, 1977, and that the IAM's status as representative of the cargo agents was terminated.

After sending the telegram, Air France officials met with the cargo agents at each of its stations to explain the situation and to make arrangements for the future now that the IAM representation had terminated. Air France suggested that the employees select a small number of their colleagues with whom Air France could meet to discuss continuation of their employment under essentially the existing working conditions, as well as to discuss any problems or suggested changes in working conditions. No reduction in existing benefits was made.

Some six weeks following notification of termination of the Agreement, IAM commenced this action, seeking to compel Air France to reinstate its recognition of the IAM and the terminated Agreement. The IAM complaint alleged that Air France, "No longer recognized the IAMAW as the representative of the cargo employees" (¶9), and that Air France is attempting to "eliminate the IAMAW as the representative of the cargo agents." (¶11).

On July 1, 1977, the district court denied the IAM's motion for a preliminary injunction and dismissed the complaint for lack of jurisdiction, holding that (1) the district court had no "authority to interpret the terms of the collective bargaining agreement and determine whether Air France's actions are in lawful compliance with the agreement," as that was a minor dispute within the exclusive jursidiction of the System Board of Adjustment (App. C, p. 19a); (2) the court was without jurisdiction to issue an injunction to preserve the status quo in aid of the System Board's jurisdiction, as the dispute had not been submitted to the System Board (App. C, pp. 20a-21a); and (3)

"the gravamen of the complaint concerns IAM's continued *representation* of Air France's cargo agents," a dispute "within the primary jurisdiction of the NMB" (App. C, p. 26a; emphasis in original).

On December 6, 1977, the Court of Appeals for the Second Circuit affirmed the judgment of the district court "essentially for the reasons stated by [the district judge]." (App. A, p. 4a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

There is no Conflict Between the Decision Below and Those of Other Courts of Appeals

Petitioner asserts that review of the decision below is necessary to resolve an alleged conflict with the decision of the Court of Appeals for the Seventh Circuit in *Burlington Northern, Inc. v. American Railway Supervisors Association,* 503 F.2d 58 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975). There is no such conflict.

The *Burlington Northern* decision was correctly distinguished by the Court below, in its statement from the bench, as involving enforcement of a labor contract, made by a predecessor carrier with a certified union, which had been imposed by the ICC as a precondition of a merger agreement (App. A, pp. 2a-3a). Jurisdiction in that case was thus squarely predicated on both the merger agreement itself and the ICC approval of the agreement, pursuant to the Interstate Commerce Act. *Burlington Northern* was a true contract enforcement case, since obviously, in relying on the Merger Agreement, the carrier would not be allowed to disavow its acceptance of the labor contracts which was a precondition of the

validity of the Merger Agreement.[3] Here, there is no underlying merger, or other, agreement for the court to enforce; it therefore had no jurisdiction to determine whether the IAM remained the representative of the cargo agents despite the express limitation, and termination, of that status by the very "voluntary agreement" which accorded it.

Petitioner here contends that Air France's termination of, and failure to adhere to, a contract with the IAM, and its failure to treat the IAM as the exclusive representative of the cargo agents constitute violations of the Railway Labor Act. The underlying assumption of such charges is that Air France had a statutory (*i.e.* RLA) obligation to maintain the contract and to continue to recognize the representative status of the IAM. What petitioner would have the Court ignore is that its representative status came from the contract, not the statute; the contract provided for termination of that status and the contract itself; and there can be no violation of statutory obligations arising from contract and representative status in the absence of both.

Petitioner agrees that the "crux of the decision" below was the district court's finding that "the issue here is really one of representation, a subject which Congress has given the Mediation Board the duty to determine," (Pet., p. 8), but asserts that the court had jurisdiction over its complaint in the absence of any present challenge to its status before the NMB. The decision below, however, far from creating a conflict in the

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[3] Moreover, as the quotation from that case (Pet., p. 9) shows, the union there had been certified. Petitioner misstates the holding of *Burlington Northern*, even as it applied to the facts of that case, in its assertion that "Under the Burlington Northern decision the NMB would not have jurisdiction and the relief sought for violations of the RLA would properly be before the Federal Courts. . ." (Pet., p. 10), since (1) the *Burlington Northern* court indicated that even the union recognition required by the Merger Agreement would have to give way to a determination by the NMB (503 F.2d, at 63); there is no suggestion in that case that the NMB's exclusive jurisdiction over *representation questions* was at all diminished by its holding; and (2) the *Burlington Northern* decision had nothing to do with relief for "violations of the RLA", such as that allegedly sought by petitioner here.

circuits, continues the extensive line of judicial authority which holds that where there is doubt as to whether a union is or remains the legitimate representative of a carrier's employees, the courts do not have jurisdiction to determine the question of representation. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Flight Engineers' International Association v. Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964). There is no authority to support petitioner's contention that courts are divested of jurisdiction in representation matters only by the actual institution of a representation proceeding before the NMB which can be done only by action of the employees, not of the carrier. See, to the contrary, *International Association of Machinists v. Northeast Airlines, Inc., supra.* Except to enforce the NMB's statutory obligations, see *International In-Flight Catering Co. v. National Mediation Board*, 555 F.2d 712 (9th Cir. 1977), the courts have no jurisdiction over representation matters, whether a question is pending before the NMB or not, because Congress has given exclusive authority to the NMB to decide all questions concerning employee representation.

In sum, what petitioner here wanted the courts below to do is first to declare that it is the employee representative and then to determine that Air France had violated a mandatory duty to deal with it. No statutory requirement, however, compels Air France to recognize and bargain with the IAM for a group of employees who, under the statute, have no right to select a representative. It was only by contract that the IAM attained representative status, a contract which put an express limitation on that status, and which has terminated pursuant to that limitation. If the employees involved desire representation by the IAM, or by any other union in a craft or class, they, or their organization, are free to seek the services of the NMB under

Section 2, Ninth to investigate any alleged representation dispute within an established craft or class, or in any group which the NMB may determine is a craft or class.

II
The Case Does Not Involve An Important Question Under the Railway Labor Act, and was Properly Decided on its Unique Facts

A. *RLA Sections 2 and 6 do not Apply to a Terminated Limited Agreement to Recognize an Employee Representative.*

Petitioner asserts that "[t]he issue of whether a voluntary agreement which recognizes collective bargaining representative [sic] of less than a class or craft unit is within the coverage of RLA" is one of "substantial consequence" (Pet., p. 10). Be that as it may, that is not an issue in this case. This case involves a unique agreement providing for recognition of an employee representative and voluntarily making provisions of the RLA applicable for a limited time, which terminated in accordance with terms of the agreement. The broad issue raised by petitioner was neither decided by the courts below, nor necessary to any resolution of this case. Since the district court had no jurisdiction to determine itself the merits of any minor dispute over the application or interpretation of Article XVII(q),[4] for the purposes of review, it cannot be questioned that Air France did act in accordance with the contract. It follows that the contract which extended representative status to the IAM must be treated as terminated.

Air France's argument below was only that Sections 2 and 6 of the RLA do not apply to the limited agreement to recognize an employee representative involved here. Section 2,

[4] Under the RLA, so-called minor disputes over the interpretation or application of agreements must be resolved by a System Board of Adjustment, not by the courts. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945); *International Association of Machinists v. Northeast Airlines*, 473 F.2d 549, 555 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972).

First imposes a duty on carriers and representatives of employees to "make and maintain agreements with respect to rates of pay, rules and working conditions." It imposes no obligation on a carrier to make such an agreement with anyone claiming to represent a group of employees comprising less than a craft or class and, moreover, imposes no obligation whatsoever to make and maintain agreements concerning *representative status.*

Similarly, Section 2, Second does not require conferences to resolve disputes, in the absence of a representative of employees in a craft or class, one of the statutory parties to such conference. Nor do Section 2, Seventh and Section 6 require maintenance of the status quo and notice of intended change of agreements with anyone other than craft or class representatives,[5] and then only as to agreements affecting rates of pay, rules and working conditions. They do not speak to maintenance of agreements to recognize bargaining agents for crafts or classes, much less bargaining agents for groups which do not comprise crafts or classes.

Air France does not rely on *International Brotherhood of Teamsters v. Brotherhood of Railway, Airline and Steamship Clerks,* 402 F.2d 196 (D.C. Cir.), *cert. denied,* 393 U.S. 848 (1968), for the broad proposition, stated by petitioner, that "any unit less than a craft or class, regardless of whether there is a voluntary recognition agreement, is not covered by the RLA" (Pet., p. 11). The significance of that decision to this case is the principle stated therein that when a certified representative of a craft or class is displaced as the result of an election in which no successor is designated, subsequent relationships between carrier and employees are not governed by the RLA. (402 F.2d, at 202). Similarly here, when a contractually recognized representative of a group of employees who are *not* a craft or class is displaced pursuant to the contract, the provisions of the RLA do not apply to create any duties to the former representative. On the contrary, carrier and employ-

[5] Of course, to the extent that provisions of the RLA are incorporated into a voluntary contract, the parties may have assimilated duties so long as the contract exists.

ees are relegated to the relationship which existed prior to voluntary contractual recognition. This case does not involve any of the "critical issues" posed by the petitioner (Pet., pp. 10-11), since the pre-supposition of such issues is that a voluntary recognition agreement has not terminated—as it did here—in accordance with the agreement's own limitation.

B. *Claims of Alleged Interference with Cargo Agents' Alleged Choice of Representative were Properly Dismissed.*

The complaint was properly dismissed insofar as it alleged violations of RLA Sections 2, Third and 2, Fourth by Air France's alleged interference with the cargo agents' choice of representative.

(1) The "interference" alleged by petitioner consists of Air France's termination of limited voluntary recognition of the IAM in accordance with the agreement's express limitation. The courts below had no jurisdiction to consider claims of carrier interference where the basic issue, as here, is a question of representation, *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 254 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); nor where "the underlying conduct upon which the claim is based is subject to resolution by the System Board of Adjustment," *International Association of Machinists v. Eastern Airlines, Inc.*, 320 F.2d 451, 454 (5th Cir. 1963).

(2) Absent status as the certified or acknowleged representative of the cargo agents, petitioner lacks standing to complain of the alleged subsequent interference with the rights of individual Air France employees. *Adams v. Federal Express Corp.*, 547 F.2d 319, 321-22 (6th Cir. 1976), *cert. denied*, — U.S.—, 97 S. Ct. 2177 (1977).

Conclusion

This case does not involve any conflict of decision among the Circuit Courts of Appeals, nor does it raise a significant unresolved question under the Railway Labor Act. Rather, it is a case with a unique factual setting, the termination of a contract pursuant to its express terms, unchallenged in the only forum which might adjudicate that termination, the Adjustment Board, and thus properly decided by the courts below in accord with established principles. The petition for a writ of certiorari, therefore, should be denied.

Dated: New York, New York
April 5, 1978

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-1234

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

COMPAGNIE NATIONALE AIR FRANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1234

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

COMPAGNIE NATIONALE AIR FRANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's invitation of May 1, 1978.

QUESTION PRESENTED

The United States will discuss the question whether the termination of a collective bargaining agreement pursuant to a clause allowing the contract to be terminated if the National Mediation Board should take particular action creates a "representational dispute."

a "major dispute," a "minor dispute," or simply a disputed issue of law under the Railway Labor Act.

STATEMENT

A. The Railway Labor Act

The collective bargaining rights and obligations of air carriers and airline employees are governed by the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151-188. The Act provides for the settlement of disputes concerning rates of pay, rules or working conditions and of disputes growing out of the interpretation of agreements covering rates of pay, rules or working conditions. The Act also assures employees the right to organize and to bargain collectively through representatives of their own choosing. 45 U.S.C. 152 Fourth.

The majority of any "craft or class" of employees has the right to determine who shall be the collective bargaining representative of the craft or class (*ibid.*). If a dispute arises about who should represent a craft or class, the National Mediation Board resolves the dispute. 45 U.S.C. 152 Ninth. The carrier must "treat with" the representative certified by the Board (*ibid.*). *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 547-548.

The Board determines what "crafts or classes" of employees may participate in representation elections. 45 U.S.C. 152 Ninth. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 302-304. The railroad industry has established crafts or classes. The airline industry, however, does not have established

crafts or classes, and the Board has defined divisions based on the general functions (rather than the particular tasks) that employees perform. Airline employees performing cargo agent duties, such as respondent's cargo agents, have since 1947 been included in the overall "craft or class" of Clerical, Office, Fleet and Passenger Service Employees.

Although the Mediation Board is authorized only to certify a representative for an entire craft or class, the statute permits employers and labor unions to enter into collective bargaining agreements covering groups of employees constituting less than a craft or class. Carriers frequently recognize and negotiate with representatives of employee groups that constitute less than a craft or class when there is no certified representative for the entire craft or class.

Disputes arising out of a collective bargaining agreement may be resolved under the provisions of the Railway Labor Act. The functions of the Railroad Adjustment Board and the Mediation Board in resolving railway disputes were explained in *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711.[1] The

[1] The National Railroad Adjustment Board was created in the 1934 Amendments to the Railway Labor Act, 48 Stat. 1189, 45 U.S.C. 153. Congress subsequently authorized the National Mediation Board to establish a permanent National Air Transport Adjustment Board at its discretion. 49 Stat. 1190, 45 U.S.C. 185. The National Mediation Board has not done so, and airline industry grievances are handled by system, group or regional boards of adjustment. 45 U.S.C. 184. See *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 685-689.

Act distinguishes between two categories of labor disputes (325 U.S. at 723; footnote omitted):

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. * * *
>
> In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world.

"Major disputes" involve "the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid" (325 U.S. at 723-724). They are mediated under the auspices of the Mediation Board.[2] "Minor disputes" involve "the smaller differences which inevitably appear in the carrying out of major agreements and policies"

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[2] The procedures for the voluntary settlement of major disputes are described in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378.

and seldom produce strikes (*id.* at 724). They are resolved by the Adjustment Board. Any party may submit a dispute to the Adjustment Board for decision, whether or not the other is willing, provided that the submitting party has discharged the initial duty of negotiation (*id.* at 727).

B. The Present Controversy

For 25 years petitioner has represented respondent's cargo agents and lead cargo agents. The parties have entered into agreements covering rates of pay, rules and working conditions, and they have occasionally invoked the services of the Mediation Board to resolve disputes (Pet. 6). The most recent agreement was signed on January 3, 1977, and provides for automatic termination on September 30, 1979 (*ibid.*). Article XVII(q) of the agreement also provides (Pet. App. 10a-11a):

> Notwithstanding the "Effective Date and Duration" provisions of this Agreement and any references to the Railway Labor Act in this Agreement, if a decision of the National Mediation Board permits the certification of a representative of employees of any airline who perform functions analogous to those being performed by the employees covered by this Agreement in a group other than the class or craft of which the National Mediation Board has historically determined such employees to be a part, then this Agreement will terminate.

Respondent contends that this provision, which it drafted, was included because some of the employees

were interested in being represented by the International Brotherhood of Teamsters, and respondent did not desire to make a commitment to representation of the employees by petitioner for three years; moreover, the Mediation Board had docketed for consideration an application by the Air Line Employees Association (ALEA) seeking recognition of a new "craft or class" which would include cargo duties, thus indicating that the Board might recognize a craft or class analogous to respondent's cargo agents (J.A. 15a-22a).[3] If the Mediation Board were to recognize a new craft or class definition, respondent contended, it would become possible for its cargo employees to choose a new representative. Petitioner asserts, however, that the clause was "forced into the contract" by respondent and was accepted by petitioner only because its negotiator had been advised by petitioner's general counsel that "the clause was illegal and of no effect as it clearly violated the Railway Labor Act" (J.A. 152a-153a).

The proposed contract, including Article XVII(q), was accepted by petitioner, ratified by the employees, and signed on January 3, 1977 (J.A. 22a). The Mediation Board subsequently certified the ALEA as the bargaining representative of United Air Lines' passenger service employees (J.A. 185a-193a). Respondent immediately terminated the collective bargaining agreement, invoking Article XVII(q), and told petitioner that the company no longer would recognize

[3] "J.A." refers to the joint appendix in the court of appeals.

the union as the bargaining representative of the cargo agents (J.A. 195a). Respondent's cargo agents were notified of the termination of the agreement on the same day. At the company's request, they elected representatives to discuss working conditions with the company (J.A. 24a-25a). Although petitioner protested the termination, respondent continued to deal with the newly elected employee representatives (J.A. 27a).

On June 15, 1977, petitioner filed suit in the United States District Court for the Southern District of New York. The complaint sought an order compelling respondent to revive the collective bargaining agreement and to bargain with petitioner. Petitioner argued that respondent could not rely on Article XVII(q), because (a) the Mediation Board's ALEA decision applied to employees who performed work different from that of respondent's cargo agents, and (b) "[t]he purpose and intent of this clause is illegal and in violation of the Railway Labor Act" (J.A. 5a-6a).

The district court held that, insofar as petitioner requested the court to interpret Article XVII(q) to determine whether respondent's actions complied with the contract and the Railway Labor Act, the case presented a "minor dispute" that fell within the exclusive jurisdiction of the local System Board of Adjustment (Pet. App. 14a-20a). The court recognized that petitioner also challenged "the legality of Article XVII(q) of the contract in light of the RLA" (Pet. App. 21a), and observed that this branch of peti-

tioner's claim does not "depend upon an interpretation of the terms of the contract and is therefore not a minor dispute within the jurisdiction of the System Board of Adjustment" (*ibid.*). It reasoned, however, that because petitioner alleged that the clause was illegal as "a subterfuge intended to permit [respondent] to change the terms of the January 3 contract," this portion of the controversy is a "major dispute" within the exclusive jurisdiction of the Mediation Board (Pet. App. 21a-25a). The Court also stated that "the issue here is really one of representation, 'a subject which Congress has given the Mediation Board the duty to determine' " (*id.* at 27a).

The court of appeals affirmed the district court's decision to dismiss the complaint. It indicated, however, that it found no "major dispute" and that the case was properly treated as "a representational dispute" within the exclusive jurisdiction of the Mediation Board (Pet. App. 3a).

DISCUSSION

1. This case stems from a contract dispute. The gravamen of the complaint is that Article XVII(q), which authorized the termination of the contract, is illegal because it constitutes an attempt to evade the machinery established by statute for resolving labor disputes. The complaint did not ask the district court to "certify" a bargaining "representative" or to resolve "any dispute * * * among a carrier's employees as to who are the representatives of such employees"

(45 U.S.C. 152 Ninth). The complaint simply sought a determination whether a provision in a collective bargaining agreement that empowered the carrier to terminate the agreement based on its unilateral judgment without following the procedures prescribed by the Railway Labor Act was lawful. In these circumstances, we believe that the district court should not have dismissed the complaint.

It is settled that questions relating to the application or interpretation of collective bargaining agreements are "minor disputes" committed to the jurisdiction of the Railroad Adjustment Board or the System Boards of Adjustment. See *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 324; *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566-568. Therefore, if the sole question here were whether the Mediation Board's certification of United Air Lines passenger service personnel allowed respondent to exercise its rights under Article XVII(q) of the contract, this case would involve a "minor dispute." A System Board of Adjustment is peculiarly qualified to resolve questions of the interpretation of collective bargaining agreements. *Order of Railway Conductors* v. *Pitney*, *supra*, 326 U.S. at 567.

But because petitioner's initial argument is that Article XVII(q) is invalid, the district court was presented with a legal question at the threshold. It would be pointless for the Adjustment Board to construe an invalid clause, and the district court correctly held that the claim of illegality does not require "an interpretation of the terms of the contract and is

therefore not a minor dispute" (Pet. App. 21a). It does not follow, however, that a dispute is "major" or "representational" just because the dispute is not "minor."

"Major disputes" subject to the jurisdiction of the Mediation Board arise "where there is no [collective bargaining] agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723. See also *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 148-149. Petitioner argues here that part of the agreement is illegal under the federal statute; there is no dispute about the consummation of an agreement or its renegotiation, and therefore there is no "major dispute." The court of appeals thus properly disagreed with the district court's conclusion that the dispute is "major." The court of appeals itself erred, however, in finding the controversy to be a "representational dispute."

"Representational disputes," which occur when a union seeks to be certified as the representative of a "craft or class" of employees under the procedures set forth in Section 2 Ninth (45 U.S.C. 152 Ninth), are within the exclusive jurisdiction of the Mediation Board. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 302-307; *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 658-660. But neither petitioner nor anyone else seeks

to be certified as the representative of respondent's cargo agents, and there is no dispute among competing groups seeking representative status to be settled by the Mediation Board. The dispute therefore cannot be a "representational dispute."

Because the controversy is not "major," "minor," or "representational," it is not within the mandatory authority of the Mediation Board or an Adjustment Board. The district courts should resolve threshold legal issues in controversies such as the present one. In *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 327-328 n. 3, which adjudicated the legality of a dues "checkoff" provision, this Court stated:

> Since there was no question of interpretation or application of the collective agreement, but rather only one of its validity under the statute, the case is not one in which resort to the grievance and Adjustment Board machinery provided by the Railway Labor Act was required. "This dispute involves the validity of the contract, not its meaning."

See also *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774, holding that plaintiffs must look to "a judicial remedy" when challenging the legal validity of a collective bargaining agreement under the Railway Labor Act. And see *Seaboard World Airlines, Inc.* v. *Transport Workers Unions*, 425 F.2d 1086 (C.A. 2), which involved a provision limiting the renegotiation of a collective bargaining contract. The court held there that (425 F.2d at 1091): "[T]he question of the legality of the long prohibition on reopening in the contract between Seaboard and the

Union is important and should be determined in the first instance by the district court." [4]

Petitioner's complaint raised a colorable legal issue concerning the validity of Article XVII(q). Whether or not petitioner is right—and we express no opinion on that question—its arguments certainly were not so palpably wrong that the court had no jurisdiction to pass on them.[5] If the clause should be found to be unlawful, the district court could order respondent to adhere to the agreement and to make petitioner whole. If the clause should be found to be lawful, the district court could enter a declaratory judgment to that effect and remit the parties to an Adjustment

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[4] See also *Japan Air Lines Co.* v. *International Association of Machinists*, 538 F.2d 46 (C.A. 2), resolving a dispute about the legality of a contract agreement under the Railway Labor Act. And in *Haley* v. *Childers*, 314 F.2d 610, 615 (C.A. 8), the court summarized the applicable rule (citations omitted):

> "If the controversy involves the validity of the contract under the guarantees of the Railway Labor Act, the court has jurisdiction to grant the relief. If the issues can be determined by an interpretation of the bargaining agreement, exclusive jurisdiction is vested in the Railroad Adjustment Board."

[5] The statute creates an obligation "to exert every reasonable effort to make and maintain agreements" (*Chicago & North Western Ry.* v. *United Transportation Union*, 402 U.S. 570, 579-581), and Article XVII(q) arguably is a default on that obligation. Moreover, respondent's exercise of its right to terminate the contract arguably violated the requirement that pay, rules and working conditions not be changed without the notice required by Section 6 of the Act, 45 U.S.C. 156.

Board for the resolution of what would then be a "minor dispute"—the question whether the Mediation Board's decision in the AELA-United Air Lines case authorized respondent to invoke Article XVII(q) and terminate the collective bargaining agreement. See *Order of Railway Conductors* v. *Pitney*, *supra*, 326 U.S. at 568. The complaint therefore should not have been dismissed.

2. Although we agree with petitioner that the lower courts erred, we do not believe that review by this Court is appropriate.

First, the decision here does not conflict with *Burlington Northern, Inc.* v. *American Railway Supervisors Association*, 503 F.2d 58 (C.A. 7), certiorari denied, 421 U.S. 975. *Burlington Northern* involved, as the court of appeals pointed out (Pet. App. 2a), the enforcement of a provision that was part of an agreement that had been approved by the Interstate Commerce Commission. There was no dispute in that case about the validity or interpretation of a clause resembling that involved here.

Second, petitioner is incorrect in asserting (Pet. 10-11) that the case presents the question "whether a voluntary agreement which recognizes [a] collective bargaining representative of less than a class or craft unit" (Pet. 10) is lawful. No question of legality has been resolved by the lower courts; the dispute to this point has been about whether the courts would decide the case on its merits. Petitioner asserts that respondent "raised the issue" (Pet. 10) in the court

of appeals; even if this is accurate (which respondent denies (Br. in Opp. 8)), the court of appeals did not resolve that question, nor could it have done so in light of the district court's disposition of the case.

Third, the case appears to be unique. The parties have not drawn to the Court's attention any other collective bargaining agreement containing a clause similar to Article XVII(q), and we are aware of none. The district court's opinion, and the court of appeals' unpublished affirmance, therefore will have little if any precedential effect. The basic principles concerning the allocation of responsibility among the administrative agencies and courts have been established by this Court in *Felter*, *Elgin*, *Pitney* and other cases; the present case involves no more than their application to an unusual dispute. Thus, although, for the reasons stated above, we believe that the threshold legal question should have been resolved by the district court, we do not believe that it is necessary for this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269218 66

SUPREME COURT, U.S.
FILED
AUG 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1234

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,

Petitioner,

against

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN RESPONSE TO BRIEF FOR UNITED STATES AS *AMICUS CURIAE*

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RESPONDENT'S BRIEF IN RESPONSE TO BRIEF FOR UNITED STATES AS *AMICUS CURIAE*

The brief submitted herein for the United States as *amicus curiae* concludes, for essentially the same reasons urged by respondent, that review by this Court of the decision below is not appropriate: The decision does not conflict with the decisions of other courts of appeals; it does not present an important question under the Railway Labor Act; and it involves unique facts with little precedential effect (Am. Cur. Br., pp. 13-14). Although the *amicus* thus agrees with respondent that review should not be

granted, it expresses its view that the decision below was erroneous in not determining whether a clause in the contract between the parties was illegal.

Respondent does not agree with the *amicus curiae* that the decision below was erroneous. While mere error, in any case, is not a ground for review, respondent submits this brief in response to the brief of the *amicus curiae* so that the Court's disposition of the petition will not be influenced by the mistaken assertion that the courts below were confronted by a contract, rather than a representation question.

1. The incorrect analysis of the *amicus* flows from its opening observation that "this case stems from a contract dispute." (Am. Cur. Br., p. 8). In thus spotlighting the allegation of the complaint that the termination of voluntary contractual recognition, pursuant to the contract which granted such limited recognition, was unlawful, the *amicus* flatly contradicts the conclusion of both courts below that the issue in the case "is really one of representation" (Pet., p. 27a) and that "the gravamen of the complaint concerns IAM's continued representation of Air France's cargo agents" (Pet., p. 26a).

The *amicus* seems to say, contrary to what appears in their opinions, that the courts below reached the conclusion that the case involved a representational dispute by exclusionary reasoning, *i.e.*, simply because the basic structure of the complaint revealed neither a "major" nor a "minor" dispute under the Railway Labor Act ("RLA" 45 U.S.C. §§151, *et seq.*), what remained must have been a representational dispute (Am. Cur. Br., p. 10). *Amicus*,

moreover, argues that since "neither petitioner nor anyone else seeks to be certified as the representative of respondent's cargo agents, and there is no dispute among competing groups seeking representative status to be settled by the Mediation Board," the case cannot present a representational dispute (Am. Cur. Br., pp. 10-11). That argument, however, simply ignores the extensive authority which holds that *whenever* there is doubt as to whether a union is or remains the legitimate representative of a carrier's employees, the courts do not have jurisdiction to determine the question of representation, whether or not there has been any request for NMB certification by a union or group of employees. *See International Association of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), and other cases cited at page 7 of Respondent's Brief in Opposition.

The conclusion of the courts below that the dispute was essentially representational was based on the complaint which asserted that Air France "No longer recognized the IAMAW as the representative of the cargo employees" (¶9), and that Air France is attempting to "eliminate IAMAW as the representative for the cargo agents" (¶11). Fundamentally, the complaint sought to compel Air France to continue to recognize the petitioner as representative of its cargo agents, notwithstanding the termination of the contract which was the only source of the limited recognition extended.*

* The *amicus* overlooks the above-quoted allegations of the complaint which clearly put in issue petitioner's representative status, and erroneously says:

"The complaint simply sought a determination whether a provision in a collective bargaining agreement that empowered the

(footnote continued on next page)

By characterizing the case as a "contract" dispute, the *amicus* exalts form over substance. In *Brotherhood of Ry. & S.S. Clerks* v. *United Air Lines,* 325 F.2d 576 (6th Cir. 1963), *cert. dismissed,* 379 U.S. 26 (1964), by contrast, the court rejected a similar argument by the plaintiff union that the court had jurisdiction to determine if United was bound, following a merger with Capitol Air Lines, by that union's contract with Capitol covering the craft or class of clerical and related employees. The union contended that it did not seek an adjudication of its right to continue to represent the former Capitol employees, but only determination of the carrier's contract obligations. That argument was persuasively rejected:

> "Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute.'" [Citation omitted] 325 F.2d at 579.

carrier to terminate the agreement based on its unilateral judgment without following the procedures prescribed by the Railway Labor Act was lawful." (Am. Cur. Br., p. 9).

Amicus' summary of the complaint, apart from being incomplete, is inaccurate. The agreement did not empower respondent to terminate the agreement based upon its "unilateral judgment," but provided for such termination upon the occurrence of a specified decision by the National Mediation Board. (Petitioner chose not to submit any question of the interpretation of the operative clause to the System Board of Adjustment, so no question can be raised now, or hereafter as *amicus* suggests (Am. Cur. Br., pp. 12-13), about the meaning of the clause. Resp. Br., pp. 3-4, 8; Pet., p. 28a.) Moreover, there are no "procedures prescribed by the Railway Labor Act" for termination of an agreement granting voluntary recognition to a representative of a group of employees not entitled to select a representative under the Railway Labor Act, just as there are no procedures prescribed by that act for granting of such voluntary recognition by a carrier.

2. Having started from the incorrect premise that the case involves simply a claim that a contractual termination clause was illegal under the Railway Labor Act, the *amicus* proceeds to the conclusion that the courts below should have asserted jurisdiction over the complaint and resolved the legal issue of whether the clause is lawful. The simple answer to this contention is that the contract clearly does not violate any provision of the Act; neither Section 2, First nor Section 6 prescribes procedures for continuation of voluntary recognition of a representative. As explained in *Haley* v. *Childers,* 314 F.2d 610, 613 (8th Cir. 1963) (cited by Am. Cur. Br., p. 12, n.4), mere conclusory allegations that a contract violates the Railway Labor Act are wholly insufficient to confer federal jurisdiction.*

While the *amicus* asserts that the complaint raised a "colorable legal issue" concerning the validity of Article XVII(q), and that the argument as to illegality is not "palpably wrong" (Am. Cur. Br., p. 12), the *amicus* significantly does not contend that the clause was illegal. It suggests in a footnote only that the termination clause was "arguably" a violation of the obligation imposed by RLA Section 2, First to "make and maintain agreements" with respect to rates of pay, rules and working conditions, or of the requirement that "pay, rules and working conditions not be changed without the notice required by Section 6 of the Act" (*ibid.*). The existence of those asserted statutory obligations, however, is dependent on petitioner's continued status as the representative of respondent's cargo agents.

*"[A] mere conclusion of law or, as here, a naked conclusory allegation that a bargaining contract violates a federal statute, has no efficacy and is wholly insufficient to confer jurisdiction upon the federal court where such allegation is unwarranted by the asserted facts and is contradictory to well pleaded facts." *Haley* v. *Childers,* 314 F.2d at 613.

But petitioner has no statutory right to represent the cargo agents, a group of employees not comprising a craft or class.* Its claim to such representative status sprang only from the contract, which, in extending recognition, simultaneously limited such representative status to continue only until the occurrence of conditions which did occur. For the courts to assume jurisdiction to determine whether the contract was illegally terminated unavoidably would result in a decision that petitioner either was or was not the representative of the cargo agents—and that question, as the courts below held, is one within the exclusive jurisdiction of the National Mediation Board.

In none of the cases cited by the *amicus* (Am. Cur. Br., pp. 13-14), upholding the assertion of jurisdiction where a specific question is raised as to the legality of a contract provision under the RLA, was the contract question inextricably interwoven with the question of whether the plaintiff was the representative of the employees. On the contrary, in none of those cases was the union involved seeking affirmation that it was the employees' representative.**

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* The statement of *amicus* (Am. Cur. Br., p. 3) that "the statute permits employers and labor unions to enter into collective bargaining agreements covering groups of employees constituting less than a "craft or class" is true only in the sense that the statute does not prohibit such agreements.

** *Felter* v. *Southern Pacific Co.*, 359 U.S. 326 (1959) involved a claim that the contractual restrictions on revocation of a dues checkoff authorization violated Section 2, Eleventh of the RLA. In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952) the claim was that the provisions of a contract with a union representing only white employees were racially discriminatory.

Contrary to the statement of the *amicus curiae* (Am. Cur. Br., p. 12, n.4). *Japan Air Lines Co.* v. *International Association of Machin-*

(footnote continued on next page)

Conclusion

For the reasons expressed by the United States as *amicus curiae*, and for the additional reason that the decision below is correct, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 21, 1978

Respectfully submitted,

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ists, 538 F.2d 46 (2d Cir. 1976), did not resolve a dispute about "the legality of a contract agreement under the Railway Labor Act," but concerned rather the question whether a union proposal that the carrier hire additional employees to perform work which had always been subcontracted was a mandatory subject of bargaining, and whether insistence by the union on such proposal in negotiations violated the requirement of RLA Section 2, First, that the parties exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. There was no claim in that case that any agreement, or the union's proposal, in itself, was illegal under the RLA.